No. 1.
2d Supp. Br. of Howard Dillon
for Appellees.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Jan. 3, 1898.

No. 1.

CITY OF NEW ORLEANS, APPELLANT,

vs.

TEXAS AND PACIFIC RAILWAY COMPANY ET ALS., APPELLEES.

ADDITIONAL MEMORANDA FOR APPELLEES.

I.

That the grants here in question were made *in presenti*, and on conditions subsequent or resolutory and not precedent or suspensive, is obvious. The two questions here are of the illegality of the two repealing ordinances—685, C. S., and 1828, C. S.—which attempt to destroy the rights respectively granted and vested (*a*) on the batture in front of the park, and (*b*) in Claiborne street.

1. As to the rights on the batture, they must have vested *in presenti*, for the railway company accepted them (p. 25),

and paid two annual installments of rent for 1881–'2 and 1882–'3, and tendered a third for 1883–'4. How could it be paying rent and the city receiving and keeping it prior to the expiration of the two years' time limit, if the grants were not *in presenti* and the rights presently vested?

Again, by section 3 of ordinance 6938, A. S. (Transcript, p. 59), the right was given the railway to extend its tracks from this batture along the river front to Louisiana avenue, and thence down to Jackson street, there to connect with its tracks theretofore authorized to be constructed from Julia street up to Jackson street along the river front, thus making a line from the batture in front of the park down to our terminus at Thalia street on the river, and thence down to terminals of the Jackson railroad (now Illinois Central) and those of the Louisville and Nashville and Morgan or Southern Pacific systems. (See Harrod's map, brought up in original, "R., 4," and Transcript, pp. 76 and 77.) Why should we pay rent and the city receive it, and why should we set up the terminals at Thalia street and the river alongside of the other important terminals of other great lines, and do this long before the two years expired, and have the right to connect our tracks on the batture with these terminals, if the rights on the batture were not presently vested?

2. So as to rights in Claiborne street. Again, see Harrod's map offered by the city and which delineates the lines granted us (R., 4). Not only are the grants *in presenti* in their language (Transcript, pp. 54, 55, 56), but nearly a year before the time limit of two years could have expired the railway company was trying to establish a passenger station

on the neutral ground of the street near Canal street and get down a track, and on July 15, 1882, the city passed the ordinance 7946, A. S. (p. 61), to prepare the way for immediate action, which action was only delayed by the neglect of the city herself. (See Transcript, p. 31.)

How could all this be going on if we had no present grant and vested right to lay a track in Claiborne street for passenger purposes and move a city market which stood across our path?

3. As to both grants sought to be destroyed by the repealing ordinances, not only is the language of the 6th section (Transcript, p. 60) plainly *in presenti* ("are and were granted"), but the doing of certain things by the railway company is stated as a "consideration"—a kind of price to be paid on a credit of two years. If I sell a plantation in Louisiana, by a sale made in Louisiana, for $50,000, to be paid in two years, the estate vests at once in the vendee, and if the consideration be not paid at the end of the two years, I may bring a suit to dissolve the sale, to set aside the grant, and re-enter. We here find another reason for holding the conditions all subsequent and resolutory.

4. As to both grants, we may again refer to the ordinance 7946, A. S., of July 11, 1882, where the grants are referred to as made in the past and as having vested, and not as something to vest in the future. (Transcript, p. 61.)

When we consider all these facts and circumstances and those set forth in our other briefs, we may well recur to the language of the jurist Larombière already cited:

"To contract and then to remain in the *statu quo* of a "suspensive condition is something so little in harmony "with the natural effect of a contract that one can admit it "only on the evidence of complete proof. It is then to "enter at once into the spirit of the law and into the inten- "tion of the parties when we *presume*, in case of doubt, "*that a condition is resolutory rather than suspensive.*" (Vol. 2, p. 8, No. 8.)

And to this we may add his remark in the same connection, that in trying to find out what parties mean in this respect "we must not dwell too literally on the expressions "they have employed."

II.

The references made above to Mr. Harrod's testimony and the map of lines given us as shown by him in his sketch "R. 4" furnish a vivid explanation of why it was that on July 11, 1882, the city administration, by an ordinance unanimously adopted, held that we had complied with the conditions of the ordinances, had established our terminus in the city limits at Thalia street and the levee, and had connected it with a crossing of the Mississippi river at that point (Transcript, pp. 26, 33, 64, 65), so that our passenger and freight trains thus run from these extensive terminals within the city limits to Shreveport and El Paso. The testimony and map show a wise plan resulting from the fact that our road was built down on the west bank of the river, crossing to New Orleans at Thalia street, as contemplated by ordinance 6938, page 58. Our terminus was placed by us at Thalia street, on the river, alongside of the terminals of

three other trunk lines. Thousands of cars coming weekly from the West and going to the West could thus come into New Orleans and go out, and could also be exchanged with these three other trunk lines with the shortest trackage and the least expense in charges to the public, and with a *minimum of danger to life and property*—a danger sure to come if we drew them through the heart of the city to and from Claiborne street, a distance of twenty-four blocks. Add to this the close connection with the shipping of the world, with a maximum of speed and a minimum of cost and danger, and it may be easily seen why in July, 1882, before any time limit had expired, the city administration distinctly expressed its satisfaction with the designation and establishment of our terminus.

Under the ordinances 6695 and 6732, A. S., we could only use Claiborne street for *passenger* trains, and Thalia street leading thence to the river for *freight* trains (Transcript, p. 56). But in the change of plan, necessitated by the fact that the railroad came down the west bank of the Mississippi river, crossing into New Orleans at Thalia street, a change conceded to have been agreed to by the city (see Appellant's Brief, p. 30), in the last granting ordinance of March 29, 1881 (Transcript, p. 59, sec. 4), the terminal facilities to be established between Thalia and Terpsichore streets on the river front were plainly allowed to be used for *both* purposes—passengers, freight, or any other matters proper in the transaction of the business of the company. It would appear from this that the intention of all parties was that our terminus, in its most useful and inclusive sense and form, was to be established there, and it was established and connected with a crossing of the Mississippi

river within the two years, and the fact fully recognized in the next ordinance, No. 7946 (Transcript, p. 61), and there it has been operated and maintained ever since.

The constitution of Louisiana declares railroads to be public highways (article 244.) There could be nothing secret in these matters. The designation and establishment of our terminus and its recognition in July, 1882, were perfectly public and open to all men. The theory of conditions precedent and the idea that the grants never vested at all because the terminus was not placed somewhere else was never heard of until the answer was filed in this case in 1886. *Apices legis non lex.* It was plainly an afterthought, and courts do not like afterthoughts. And so little did the city value this quiddity that down to 1888, and now, she is in the State court judicially asserting and admitting that our rights did vest *in presenti* (see petitions at pp. 68–71 of Transcript), and that we accepted and availed of them.

III.

At page 2 of our original brief we cited the charter of the New Orleans Pacific Railway Company, a legislative act, No. 14 of 1876. By a power superior to that of the city and in modification of any restrictions on the powers of the city, it gave us special authority to run along and across any river in the State. In view of this special right and in regulation and arrangement under the general power of the city to administer the bank of the river in the interest of commerce and public highways of commerce, the lease

of the batture in front of the park was made. And the city, as riparian owner, also thus obtained an annual revenue to improve the park.

IV.

In its fourth assignment of errors the city claims that the repealing ordinance 1828, C. S, has made it legally impossible to build in Claiborne street. We fail to understand this idea. We assert that the repeal was illegal and inoperative for three reasons, at least; that the city could not repeal a grant for alleged happening of resolutory conditions or for nullities; that we had complied with those conditions, and that the city, by refusal of lines between Louisiana avenue and Jackson street and by neglect and refusal to select lots for the Claiborne market after July 11, 1882, had prevented the fulfillment of obligations as to the grants sought to be repealed. The city cannot take advantage of its own wrong, nor is the case one where a statute having been repealed *pendente lite* the courts will no longer consider some questions concerning it.

And we here repeat what we have already alluded to, that a condition is considered as fufilled when the obligee prevents its fulfillment (Rev. C. C., 2040 (2038)—a plain maxim of justice. How could we build under our grants in Claiborne street with a market-house cutting them in two and the city in default in not selecting lots to which we could move it? How could we lay tracks, &c., on the batture in front of the park when the necessary connection of them was illegally denied us by refusing lines on the river

front from Louisiana avenue to Jackson street, a gap of thirteen blocks? These questions answer themselves.

We print these supplemental remarks merely in aid of what we have already said in our other briefs and not, of course, as being all the points in our favor on these questions. We ask the kind attention of the Court to all our printed arguments.

Respectfully submitted.

W. W. HOWE,
J. F. DILLON,
For Appellees.

JANUARY 3, 1898.

No. 1.

Article 290 &c.

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SUPREME COURT OF THE UNITED STATES.

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No. 1.

CITY OF NEW ORLEANS

versus

TEXAS & PACIFIC RAILWAY COMPANY ET ALS.

Article 290, of Constitution of Louisiana, in effect May 12, 1898.

"RIPARIAN RIGHTS."

"ART. 290. Riparian owners of property on navigable rivers, lakes, and streams within any city or town in this State having a population in excess of five thousand [redacted]s, shall have the right to erect and maintain on the batture or banks owned by them, such wharves, buildings, and improvements as may be required for the purposes of commerce and navigation, subject to the following conditions, and not otherwise, to-wit: Such owners shall first obtain the consent of the Council or other governing authority, and of the Board of Levee Commissioners within whose munic-

ipal or levee district jurisdiction such wharves, buildings and improvements are to be erected, and such consent having been obtained, shall erect the same in conformity to plans and specifications which shall have been first submitted to and approved by the engineer of such Council or other governing authority and when so erected such wharves, buildings and improvements shall be, and remain, subject to the administration and control of such Council, or other governing authority, with respect to their maintenance and to the fees and charges to be exacted for their use, by the public, whenever any fee or charge is authorized to be and is made; and shall be and remain subject to the control of such Board of Levee Commissioners, in so far as may be necessary for the maintenance and administration of the levees in its jurisdiction. The Council, or other governing authority, shall have the right to expropriate such wharves, buildings and improvements, whenever necessary for public purposes, upon reimbursing the owner the cost of construction, less such depreciation as may have resulted from time and decay; such reimbursement, however, in no case to exceed the actual market value of the property. Provided, that nothing in this article shall be construed as affecting the right of the State, or of any political subdivision thereof, or the several Boards of Levee Commissioners to appro-

priate, without compensation, such wharves, buildings and improvements, when necessary for levee purposes.

"The grants made by the City of New Orleans under the terms of Ordinance 11,765, Council Series, adopted January 14, 1896, authorizing the construction, use and maintenance of wharves, structures and improvements upon certain riparian property in the Sixth Municipal District, and other grants of the same nature made by the City of New Orleans to riparian owners with reference to their property, are recognized as necessary aids to the commerce of this State, and are hereby ratified and declared to be lawful, but shall in no event be construed as conferring greater privileges or rights than might be conferred under this article, or as releasing the riparian owners from the obligations herein imposed, or which may have been imposed, upon or assumed by such riparian owners by contract, municipal ordinance or otherwise."

The foregoing ratifies the grant made by §4 of Ordinance 6938, A. S. Transcript, p. 59.

Respectfully submitted,

W. W. HOWE,

May 13, 1898. *Of Counsel.*